

ORIGINAL

No. _____

90-585-1

In The
Supreme Court of the United States
October Term, 1990

ROBERT H. YOUNG,
Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING,
and HENRY ROSE,

Respondents.



PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

THOMAS M. PETERSON
RICHARD R. WIEBE*
BROBECK, PHLEGER & HARRISON
One Market Plaza
Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-0900

*Attorneys for Petitioner
Robert H. Young*

*Counsel of Record.

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H&P

QUESTION PRESENTED

Should the Court impose the habeas corpus exhaustion-of-state-remedies requirement as a prerequisite to a state prisoner bringing a 42 U.S.C. § 1983 action for money damages against state employees in their personal capacities for the denial of sentence credits?

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**PETITION FOR A WRIT OF CERTIORARI
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Petitioner Robert H. Young petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of the petition for rehearing, is reported at 907 F.2d 874. App. A. The court of appeals' initial opinion was published at 887 F.2d 237. The United States District Court's order is unreported. App. C.

JURISDICTION

The court of appeals' amended opinion and order denying rehearing were filed and entered June 25, 1990. App. A. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. § 1983 is reprinted at App. D.

STATEMENT

Petitioner Robert H. Young has been incarcerated, paroled, and then reincarcerated in the prisons of Washington State on the same sentence. He filed this pro se 42 U.S.C. § 1983 action alleging that, during his first period of incarceration, he was denied jail-time credits for time served before his conviction, thus delaying the date on which he was paroled from that initial incarceration. CR 1, 9a. Young seeks damages for this deprivation.

Petitioner Young brought this action against respondents Kenny, Manning, and Rose. Although the respondents are Washington State officials, petitioner has sued them in their personal capacities. The district court's jurisdiction over Young's complaint rested on 28 U.S.C. §§ 1331, 1343.

The respondents concede that Young's sentence was not credited with his jail time before he was paroled and was not so credited until after this action was filed. CR 20 (Defendants' Memorandum in Support of Motion to Dismiss) at 2-3 and Exs. 5, 7, 10.^{1/} The magistrate to whom the case was assigned sua sponte raised the issue of

^{1/} Citations to the district court clerk's record are given as "CR ____."

whether Young must exhaust state remedies before bringing his claim and directed the parties to brief the issue. CR 21. The district court, adopting the magistrate's recommendation (App. B), then dismissed the action for failure to exhaust state remedies (App. C).

On appeal, the United States Court of Appeals for the Ninth Circuit held that Young was required to exhaust his state remedies before pursuing his section 1983 action, but modified the district court's judgment to stay rather than dismiss the action. App. A. As the Ninth Circuit acknowledged, its holding may delay for years Young's opportunity to proceed on his section 1983 damages claim. *Id.* at 9a.

REASONS FOR GRANTING THE WRIT

**A. The Section 1983 Exhaustion Requirement Imposed By
The Ninth Circuit Is Contrary To Congress' Intent And
The Court's Decisions**

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court recognized that Congress, in establishing the mutually exclusive statutory schemes of section 1983 and federal habeas corpus, has limited the exhaustion-of-state-remedies requirement to habeas corpus claims only. In *Wolff*, the Court expressly held that prisoner section 1983 actions seeking damages for the denial of sentence credits may go forward without exhaustion, *Wolff*, 418 U.S. at 554-55, in accordance with the general principle that exhaustion is never required before bringing a section 1983 action. The Ninth Circuit in this case acted contrary to these decisions by imposing a habeas corpus exhaustion-of-state-remedies requirement on state prisoner section 1983 actions challenging the fact or duration of confinement but seeking only damages.

In *Preiser*, the Court held that the federal habeas corpus statute, 28 U.S.C. § 2254, is the exclusive remedy for a state prisoner both challenging the fact or duration of confinement *and* seeking immediate or speedier release. *Preiser*, 411 U.S. at 489-90, 500. Such claims are outside the scope of section 1983. *Id.* As habeas corpus claims, they are subject to the exhaustion requirement mandated by Congress in 28 U.S.C. § 2254(b). *Id.* at 477, 489.

Preiser repeatedly limited its definition of habeas corpus claims, and the coextensive requirement of exhaustion, to claims where both 1) the prisoner challenges the fact or duration of confinement and 2) the relief sought is immediate or speedier release. *Id.* at 489, 494, 498, 499 n. 14, 500. *Preiser* expressly excluded section 1983 damages claims from any exhaustion requirement. *Id.* at 494. "In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, . . . a damage action by a state prisoner could be brought under [section 1983] in federal court without any requirement of prior exhaustion of state remedies." *Id.* (emphasis in original).

In *Wolff*, the Court applied *Preiser* to prisoner claims alleging the unconstitutional deprivation of good-time credits and seeking both restoration of the good-time credits and damages. *Wolff*, 418 U.S. at 554-55. *Wolff* adhered to *Preiser's* differentiation between relief that shortens the term of confinement and other forms of relief, such as damages or declaratory relief, as the boundary between habeas corpus claims that must be exhausted and section 1983 claims that need not be exhausted. *Id.* The Court held that, while the request for restoration of good-time credits could only be brought as a habeas corpus claim, the request for damages for the erroneous deprivation

of credits was properly brought under section 1983 and could go forward without exhaustion, even though it would require a "determination of the validity of the procedures employed for imposing sanctions, including loss of good time." *Id.* "Under [*Preiser*] only an injunction restoring good time improperly taken is foreclosed." *Id.* at 555.

Preiser and *Wolff* are reflections of the general principle, consistently held by this Court, that exhaustion of state remedies is never required before bringing a section 1983 claim in federal court. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982) (rejecting exhaustion requirement because, in enacting section 1983, "Congress assigned to the federal courts a paramount role in protecting constitutional rights," *id.* at 503); *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). As the Court made clear in *Patsy*, it is Congress' intent that forbids an exhaustion requirement for section 1983 claims: "[W]hether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy*, 457 U.S. at 501-02; *see also id.* at 513.

The Ninth Circuit's exhaustion requirement in this case conflicts with *Preiser*, *Wolff*, and the hard-and-fast rule that exhaustion is never required under section 1983. *Preiser* and *Wolff* recognized only two classes of claims that a constitutionally invalid sentence or conviction could give rise to: a section 1983 claim for damages, that, like other section 1983 claims, need not be exhausted, or a habeas corpus claim seeking a speedier release that is subject to the habeas corpus exhaustion requirement. *See Preiser*, 411 U.S. at 489-90, 494. Under *Preiser*, a claim seeking a

speedier release is not a section 1983 claim that must nonetheless be stayed for exhaustion--it is not a section 1983 claim at all but a habeas corpus claim. *Id.* at 489-90. In this case, however, the Ninth Circuit created a third class of hybrid claims unanticipated by *Preiser* or *Wolff*, or by Congress: damages claims that arise under section 1983 but that nonetheless are subject to the habeas corpus exhaustion requirement.

The Ninth Circuit acknowledged this conflict by confessing that it was "unable to come up with a principled way of distinguishing *Wolff*." App. A at 7a. Nonetheless, it imposed an exhaustion requirement, relying on vague forebodings that actions like Young's would frustrate federal-state comity. The Ninth Circuit's abstract enthusiasm for comity fails to recognize, as this Court did in *Preiser* and *Wolff*, that Congress has already struck the balance between the federal and state interests implicated here and has decided that section 1983 actions like Young's should go forward without exhaustion. In these circumstances,

[i]t is not enough to argue before a court that a particular construction of § 1983 is inconsistent with 'principles of federalism' or 'federal-state comity.' To do so is to put the cart before the horse, for the only principles of federalism and comity that justify restricting the scope of § 1983 are those found in the Constitution or § 1983 itself.

BLACKMUN, *Section 1983 and Federal Protection of Individual Rights--Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. Law Rev. 1, 23 (1985). The Ninth Circuit's reweighing of the comity interests in this case contrary to Congress' intent cannot justify dispensing with "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

In addition to the Ninth Circuit, six other circuits have failed to heed the commands of Congress and this Court and have imposed similar section 1983 exhaustion requirements.^{2/} See *Gwin v. Snow*, 870 F.2d 616, 626-27 (11th Cir. 1989); *Offet v. Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Hanson v. Heckel*, 791 F.2d 93, 94-96 (7th Cir.

^{2/} Three of the nine opinions from other circuits cited by the Ninth Circuit (App. A at 5a-6a) do *not* stand for this proposition.

Brown v. Fauver, 819 F.2d 395 (3d Cir. 1987), did not raise or address the issue of whether a section 1983 damages action challenging the fact or duration of confinement is subject to the habeas corpus exhaustion requirement. The prisoner in that case, like the prisoners in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), brought a section 1983 action seeking only "restoration of his good-time credits and, consequently, speedier release from prison," and *not* money damages; thus *Preiser* plainly barred his action and the *Wolff v. McDonnell*, 418 U.S. 539 (1974) exception for damages actions did not apply. *Brown*, 819 F.2d at 397, 399.

Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974), was decided before this Court decided *Wolff*. In *Guerro*, the First Circuit held that the prisoner's section 1983 claim for damages, although it challenged the validity of his conviction, did not "come within the 'core of habeas' as defined in *Preiser*" and thus that *Preiser* was not controlling. *Id.* at 1252. Unlike *Young*, however, the prisoner in *Guerro* had brought his federal court section 1983 action during the pendency of his state-court direct appeal of his conviction, thus implicating concerns under *Younger v. Harris*, 401 U.S. 37 (1971), that the section 1983 action might interfere with an ongoing state prosecution. *Guerro*, 498 F.2d at 1251, 1253-55 & n.18. The First Circuit thus held that the action should be dismissed or held in abeyance pending the completion of ongoing state proceedings. *Id.* at 1255.

In *Mack v. Varelas*, 835 F.2d 995 (2d Cir. 1987), the prisoner's section 1983 damage claim was based on an alleged constitutional violation that, even if true, would not impair the validity of his conviction. *Id.* at 998-99. Thus, the Second Circuit held that the district court had improperly construed the complaint as a habeas corpus petition, that *Preiser* did not bar his action, and that he was not required to first exhaust his claim. *Id.* The Second Circuit did order his section 1983 action stayed, however, because, like the prisoner in *Guerro*, he had brought it while his state-court direct appeal of his conviction was pending. *Id.* at 999-1000. This stay, however, was not based on the habeas corpus exhaustion requirement but on prudential grounds "because one possible outcome of the [pending] state court proceedings could negate an essential element of [the prisoner's] claim." *Id.* at 999.

Guerro and *Mack* thus are examples of federal court abstention in the face of ongoing state proceedings and not of the application of the habeas corpus exhaustion requirement of 28 U.S.C. § 2254(b).

1986); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985); *Todd v Baskerville*, 712 F.2d 70, 73 (4th Cir. 1983); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. Unit A July 1981). This Court should grant certiorari to correct this persistent error of the lower courts on this common and recurring question.

B. The Section 1983 Exhaustion Requirement Has Been Widely Criticized

The rule adopted by the Ninth Circuit has been widely criticized in other circuits because of its conflict with *Preiser* and *Wolff*. In *Gwin v. Snow*, 870 F.2d 616 (11th Cir. 1989), the Eleventh Circuit found that to require the exhaustion of state remedies before allowing a prisoner to pursue a section 1983 action challenging the legality of the fact or duration of confinement, but seeking only damages, "impermissibly conflict[s]" with *Preiser* and *Wolff*. *Id.* at 623. It nonetheless adhered to this exhaustion rule, but only because the rule was a binding circuit precedent. *Id.* at 624.

The Fifth Circuit's similar rule was criticized at its adoption by Judge Tjoflat, joined by Judges Tuttle, Goldberg, and Godbold, who said that the "plain language of the Supreme Court" in *Preiser* and *Wolff* foreclosed "the notion that the exhaustion doctrine applies in section 1983 prisoner damage suits." *Meadows v. Evans*, 550 F.2d 345, 346, 349 (5th Cir.) (en banc) (Tjoflat, J., dissenting), *cert. denied*, 434 U.S. 969 (1977); *see also Meadows v. Evans*, 529 F.2d 385, 387 (5th Cir. 1976) (panel opinion) (Tuttle, J., dissenting) (same).

Chief Judge Winter dissented from the Fourth Circuit's adoption of the rule that section 1983 damages claims implicating the legality of the fact or duration of confinement must first be exhausted, stating that *Wolff* precluded that result. *Hamlin v. Warren*, 664 F.2d 29, 34-35 (4th Cir. 1981) (Winter, C.J., dissenting), *cert. denied*, 455

U.S. 911 (1982).

A panel of the Seventh Circuit has recently criticized that circuit's holding in *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986) (per curiam), and the Eighth Circuit's holding in *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1989), as conflicting with *Preiser* and *Wolff*. *Viens v. Daniels*, 871 F.2d 1328, 1330-34 (7th Cir. 1989). *Viens* narrowed *Hanson* to permit prisoners to bring section 1983 damages claims without first exhausting state remedies where the alleged unlawful conduct caused both an excessive or illegal confinement and other damages. *Id.*

Judge Arnold dissented from the Eighth Circuit panel opinion in *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987), describing the majority's reading of *Preiser* and *Wolff* as "completely untenable." *Id.* at 1261. Nor did he see any "inconsistency at all between *Preiser* and *Wolff*, either in holding or in rationale." *Id.* Judge Heaney of the Eighth Circuit also harshly criticized *Offet* for its conflict with *Preiser*, *Wolff*, and section 1983. *Bressman v. Farrier*, 900 F.2d 1305, 1309-1321 (8th Cir. 1990) (Heaney, J., dissenting).

This Court should grant certiorari to resolve the discord over the conflict between the section 1983 exhaustion requirement imposed on claims like Young's and the holdings of *Preiser* and *Wolff*.

C. The Court's Dictum in *Tower v. Glover* Did Not License the Ninth Circuit to Ignore the Precedential Effect of *Preiser* and *Wolff*

While candidly acknowledging that *Wolff* "appears to conflict with the rule we have just adopted" and that, like other circuits, "we, too, are unable to come up with a principled way of distinguishing *Wolff*," App. A at 7a, the Ninth Circuit nonetheless

held that dictum in *Tower v. Glover*, 467 U.S. 914 (1984), gave it license to disregard *Wolff*. As the Court has warned, however, it "does not decide important questions of law by cursory dicta inserted in unrelated cases." *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). The Ninth Circuit's use of the *Tower* dictum to negate the plain meaning of *Wolff* is particularly problematical.

At issue in *Tower* was whether public defenders are immune from liability under section 1983. At the end of its opinion, the Court added, "We therefore have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Tower*, 467 U.S. at 923. On its face, this is an entirely neutral statement limited to the indisputable fact that *Tower* presented no occasion for deciding the question it describes. The statement carries no implication about what the Court believed had or had not been decided in *Wolff* or any other case.

The facts in *Tower* that prompted the dictum were "Glover's [the prisoner] successful initiation and prosecution of entirely parallel and duplicative state and federal actions" and the resulting "great waste of judicial resources." *Tower*, 467 U.S. at 923. Thus, the *Tower* dictum refers not to whether section 1983 claims must satisfy the habeas corpus exhaustion requirement but to the different question of whether a federal court in section 1983 action should abstain or stay its proceedings in the face of parallel ongoing state proceedings.

Where parallel state proceedings are ongoing, several different doctrines may counsel federal abstention. For example, a federal court should ordinarily abstain during an ongoing state criminal prosecution. *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974); *Younger v. Harris*, 401 U.S. 37, 54 (1971). None of these abstention doctrines,

however, is based on the habeas corpus exhaustion requirement, and none apply where, as in Young's case, there is no parallel state court proceeding under way. Thus, the *Tower* dictum addresses a very different question from the one presented by this case or by *Wolff*.

The Ninth Circuit's use of *Tower v. Glover* is a dangerous prescription for an unmoored jurisprudence. One foundation of our legal system is the basic principle that words can be made sufficiently certain in meaning to constrain public and private conduct, whether those words are the words of a contract, the language of a statute, or a decision of this Court. The use of extrinsic evidence to contradict the plain meaning of the language of a contract undermines this principle, as does the use of legislative history to contradict the plain meaning of a statute, or, as here, the use of dictum from one decision to contradict the plain meaning of another.

The Ninth Circuit did not hold that *Tower* had overruled or modified *Wolff*.^{3/} Rather, it used the dictum in *Tower* to support an interpretation of *Wolff* that, as it admitted, "*Wolff* on its face appears to foreclose." App. A at 8a. Yet, just as the meaning of a statute is a fact, the meaning of a holding, clear on its face, by this Court is a fact, and dictum in a later case cannot alter the meaning. Thus, even if the *Tower* dictum had the meaning that the Ninth Circuit ascribed to it, reliance on that dictum to contradict the plain language of the holding of *Wolff* is untenable.

^{3/} Nor could it have. The *Tower* Court agreed unanimously that the issue described by the majority in its dictum was not presented for decision in *Tower*. *Tower v. Glover*, 467 U.S. 914, 923 (majority opinion), 924 (concurrence) (1984). Because the issue of federal court abstention identified by the *Tower* dictum presented no case or controversy in *Tower*, the *Tower* Court was powerless under Article III of the Constitution to decide the issue or to overrule or modify *Wolff* in doing so.

D. The Discredited Collateral Estoppel Rationale Abandoned
By the Ninth Circuit But Previously Relied on By Other
Circuits is Meritless

In its initial opinion, the Ninth Circuit justified its section 1983 exhaustion requirement by arguing that a state prisoner could use a federal court's determination in his section 1983 damages action of the legality of the fact or duration of his confinement to "preclude relitigation of the issue in a subsequent state habeas proceeding" and circumvent the habeas exhaustion requirement. *Young v. Kenny*, 887 F.2d 237, 238 (9th Cir. 1989). "[A] federal court judgment that [Young's] . . . credits have been improperly withheld could be used in a subsequent state proceeding to compel reduction of his remaining time in prison, foreclosing the Washington state courts from considering the issue." *Id.* at 240. Other circuits have also used this collateral estoppel rationale to justify a section 1983 exhaustion requirement. *See, e.g., Offet v. Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Hanson v. Heckel*, 791 F.2d 93, 96 (7th Cir. 1986); *Hamlin v. Warren*, 664 F.2d 29, 30 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982).

On rehearing the Ninth Circuit correctly recognized the fallacy of this collateral estoppel argument and abandoned it. App. A at 4a. The only defendants in Young's section 1983 damages action are state parole officials who are and can only be sued in their individual capacities. "Neither a State nor its officials acting in their official capacities are 'persons' under § 1983," and thus they cannot be sued under that section.^{4/}

^{4/} An exception to this rule exists that permits official-capacity suits for only injunctive relief to be brought against state officials under section 1983. *Will*, 109 S.Ct. at 2311 n.10. This, of course, is precisely the form of relief barred to a state prisoner under *Preiser* and *Wolff* as outside the scope of section 1983 and within the exclusive province of habeas corpus. Thus, this exception could never be invoked by a state prisoner to drag a state official in his official capacity into a section 1983 action for the purpose of asserting issue preclusion against the state in a subsequent state or federal habeas corpus proceeding.

Will v. Michigan Dept. of State Police, ___ U.S. ___, 109 S.Ct. 2304, 2311-12, 105 L.Ed.2d 45 (1989). Thus, neither the State of Washington nor any of its employees in their official capacities can ever be a party to Young's section 1983 damages action, nor could any other state or its officials in their official capacities ever be parties to a prisoner's section 1983 action for damages. Because neither the State nor its officials in their official capacities are parties, an essential element of collateral estoppel is absent and the State cannot be precluded from relitigating issues decided in this action in any subsequent action brought by Young.^{5/}

Collateral estoppel, or issue preclusion, can only be asserted against a party that has "litigated and lost in an earlier action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). "Some litigants--those who never appeared in a prior action--may not be collaterally estopped without litigating the issue." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

Additionally, issue preclusion requires not only that the party to be precluded in the second action be a party to the prior action but also that the party appear in the same capacity in both actions. RESTATEMENT (SECOND) OF JUDGMENTS § 36 (1982). In a suit against a government official in his or her personal capacity the official does not represent the government and the government is not a party. "A victory in a personal-capacity action is a victory against the individual defendant, rather than against

^{5/} Apart from violating the rules of issue preclusion, to accord preclusive effect to the prisoner's section 1983 action in a subsequent habeas corpus or other post-conviction proceeding would allow section 1983 plaintiffs "to circumvent congressional intent [that states not be subject to suit under section 1983] by a mere pleading device" *Will*, 109 S.Ct. at 2311, and enforce against a state in a second action a judgment that no court would have had jurisdiction to adjudicate directly against the state in the first action.

the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense." *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985).

Because the governmental entity is not a party and has no opportunity to present its claims or defenses, an action against a government official in his or her personal capacity has no preclusive effect in a later suit against the governmental entity or against any of its officials in their official capacity, including the official who was a party to the first action in his or her personal capacity. 18 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4458 at 508-09 (1981) ("judgment against an official who has litigated in his personal capacity is not binding on his government"); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶0.411[3.-1] at 414-18, ¶0.411[4] at 436-38 (1988) ("a judgment rendered in one suit has no conclusive force in the other, if the person is a party to one suit solely as an individual, and is a party to the other solely in his capacity as . . . public official"); *RESTATEMENT (SECOND) OF JUDGMENTS* § 36 and comment e (1982); see also *United States v. Lee*, 106 U.S. 196, 217 (1882) ("the United States are not bound by a judgment to which they are not parties, and . . . no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment").

Any subsequent state or federal habeas corpus or other postconviction proceeding by Young challenging the fact or duration of his confinement and seeking either immediate release from that confinement or a shortening of its duration will be a suit against the State of Washington in which the State can relitigate any issue

concerning the legality of Young's confinement determined in this section 1983 action.^{6/} This Court's review is required to correct the erroneous conclusion to the contrary by many courts that collateral estoppel would bar relitigation by the State of issues determined in a prisoner's section 1983 damages action.^{7/}

CONCLUSION

The writ of certiorari should be granted.

DATED: September 24, 1990

Respectfully submitted,

THOMAS M. PETERSON

RICHARD R. WIEBE*

BROBECK, PHLEGER & HARRISON

One Market Plaza

Spear Street Tower

San Francisco, CA 94105

Telephone: (415) 442-0900

Attorneys for Petitioner

Robert H. Young

*Counsel of Record.

^{6/} This is true even if the postconviction proceeding is nominally brought against one of the State's officials in his or her official capacity as Young's custodian, because only the State can provide the relief sought--release from confinement. "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity," and the entity is the source of any relief awarded. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (emphasis in original) (citation omitted); see also *id.* at 165-69 & nn. 11, 14; *Brandon v. Holt*, 469 U.S. 464, 471-73 (1985) (judgment in official-capacity suit imposes liability on the governmental entity alone); *Stafford v. Briggs*, 444 U.S. 527, 535-45 & n.10 (1980).

^{7/} In their solicitude for the interests of the State, the Ninth Circuit and the other courts imposing a section 1983 exhaustion requirement have ignored the collateral estoppel that would run against the *prisoner* who exhausts. If the prisoner first litigates and loses in a state court proceeding against the State challenging the lawfulness of the fact or duration of his confinement, the individuals he sues in federal court under section 1983 can then invoke that adverse determination to preclude him from relitigating the issue. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). (By contrast, a federal habeas petitioner who exhausts is *not* precluded from relitigating issues determined adversely in state court.) The "procedural" section 1983 exhaustion requirement thus in many cases will bar prisoners forever from having their day in federal court on the merits of their section 1983 claims.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT H. YOUNG,
Plaintiff-Appellant,
v.
PHYLLIS KENNY, THOMAS MANNING,
HENRY ROSE,
Defendants-Appellees.

No. 88-3995
D.C. No.
CV-87-722-JET
**ORDER AND
AMENDED
OPINION**

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Submitted July 25, 1989*
San Francisco, California

Filed October 11, 1989
Amended June 25, 1990✓

Before: James R. Browning, Alex Kozinski and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Constitutional Law

Modifying the district court's judgment of dismissal, the

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

court of appeals held that the district court must stay rather than dismiss a prisoner's 42 U.S.C. § 1983 action for deprivation of good-time credits until state remedies are exhausted.

The court amended its opinion filed October 11, 1989. With this amended opinion, the petition for rehearing was denied and the suggestion for rehearing en banc rejected. Appellant Washington state prisoner Robert Young filed a section 1983 claim for damages, alleging that state officials had unconstitutionally failed to apply jail-time credits to his prison sentence. Young appealed the district court's dismissal of his claim.

[1] Where a state prisoner challenges the fact or duration of his confinement, his sole remedy is a writ of habeas corpus. This is largely because, while a habeas prisoner must exhaust state remedies, a section 1983 plaintiff need not. [2] If habeas were not the exclusive federal method for challenging the length of a state prison sentence, [3] the purpose of the exhaustion requirement, to give the state courts the first opportunity to rule on the claims of state prisoners, would be frustrated. [4] All nine federal circuit courts to consider this question have arrived at the same conclusion. [5] Because Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld, would undermine the exhaustion requirement and frustrate important values of federal-state comity. Dismissal, however, could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement. A prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim. Accordingly, some district courts stay, rather than dismiss section 1983 claims. This is a wise policy. It would hardly promote the goals of the 1871 Civil Rights Act to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late.

COUNSEL

Robert H. Young, Pro per, Shelton, Washington, for the plaintiff-appellant.

Aaron K. Owada, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

ORDER

The opinion filed on October 11, 1989, is amended as reflected in the attached revised opinion.

With these amendments the petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

OPINION

KOZINSKI, Circuit Judge:

Robert Young, a Washington state prisoner, filed a complaint for damages pursuant to 42 U.S.C. § 1983 (1982), claiming that state officials had unconstitutionally failed to apply jail-time credits to his prison sentence. The district court dismissed his complaint; we modify the district court's order to stay rather than dismiss the claim.

[1] 1. Where a state prisoner challenges the fact or duration of his confinement, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90, 500 (1973).¹ This is largely because, while a habeas petitioner

¹Where a prisoner wishes to challenge the conditions of his confinement, by contrast, a section 1983 action is a proper avenue of redress.

must exhaust state remedies, *Rose v. Lundy*, 455 U.S. 509, 515 (1982), a section 1983 plaintiff need not. *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975). The exhaustion requirement in federal habeas actions "is rooted in considerations of federal-state comity." *Preiser*, 411 U.S. at 491. It is well-established that the states have a substantial interest in the administration of their prisons, and in the correction of any problems that may arise therein. "The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492.

[2] If habeas were not the exclusive federal method for challenging the length of a state prison sentence, the exhaustion requirement could be undermined by a section 1983 plaintiff who obtains a federal court's ruling that his sentence is too long. A prevailing section 1983 plaintiff in an action seeking release from jail or other prospective relief could obtain a judgment against state officials in their official capacities. *See Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2311 n.10 (1989). Such a judgment might preclude the state from relitigating the issue in a subsequent state habeas proceeding, frustrating the exhaustion requirement and the important considerations of federal-state comity it protects.

[3] Federal-state comity is a concern even where, as here, the prisoner does not specifically request the reduction of his sentence in the section 1983 complaint. Before a district court could award damages to Young, it would have to determine that his jail-time credits were unconstitutionally withheld. Such a ruling would not bar a state from relitigating the issue in a subsequent state habeas proceeding because "neither a State nor its officials acting in their official capacity are 'persons' under § 1983" when the relief requested is damages. *Will*, 109 S. Ct. at 2312. Nevertheless, should a federal court find a term of imprisonment unlawful without first giv-

ing the state court system an opportunity to correct its own constitutional errors, it may result in "unnecessary friction between the federal and state court systems." *Preiser*, 411 U.S. at 490. Were the state court then to uphold the sentence, the prisoner would be entitled to bring federal habeas, perhaps in the same district court that had earlier ruled that the sentence was unlawful. The purpose of the exhaustion requirement — to give the state courts the first opportunity to rule on the claims of state prisoners — would accordingly be frustrated. As a result, habeas must be the exclusive federal remedy not just when a state prisoner *requests* the invalidation or reduction of his sentence, but whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long.

[4] All nine federal circuit courts to consider this question have arrived at the same conclusion. See *Guerro v. Mulhearn*, 498 F.2d 1249, 1251-55 (1st Cir. 1974) (request for money damages barred where resolution would require determination that state conviction was invalid); *Mack v. Varelas*, 835 F.2d 995, 998 (2d Cir. 1987) (section 1983 action proper where success would not lead to more speedy release); *Brown v. Fauver*, 819 F.2d 395, 397-99 (3d Cir. 1987) (restoration of good-time credits obtainable only via writ of habeas corpus where sentence still being served); *Todd v. Baskerville*, 712 F.2d 70, 72-73 (4th Cir. 1983) (same); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. Unit A July 1981) ("any § 1983 action which draws into question the validity of the fact or length of confinement must be preceded by exhausting state remedies," regardless of the relief sought); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (per curiam) (federal court must " 'stay its hand where disposition of the damage action would involve a ruling implying that a state conviction is or would be illegal' ") (quoting *Guerro*, 498 F.2d at 1252); *Hanson v. Heckel*, 791 F.2d 93, 94-97 (7th Cir. 1986) (per curiam) (claim of unconstitutional deprivation of good-time credits sounds exclusively in habeas where sentence still being served, despite fact that complaint sought damages but

not restoration of credits); *Offet v. Solem*, 823 F.2d 1256, 1258-61 (8th Cir. 1987) (federal court must stay section 1983 action for deprivation of good-time credits until plaintiff has exhausted state remedies); *Gwin v. Snow*, 870 F.2d 616, 626-27 (11th Cir. 1989) (section 1983 claim must be treated as habeas petition if relief requested would "undermine" conviction).

Such a rule is not inconsistent with our prior decisions, which have never expressly addressed the question, but point in the same general direction. See *Toussaint v. McCarthy*, 801 F.2d 1080, 1102-03 (9th Cir. 1986) (habeas not exclusive remedy where prisoners seek only to be moved from one location to another within a prison), *cert. denied*, 481 U.S. 1069 (1987); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 682 (9th Cir. 1984) (federal court may not rule on prisoner's section 1983 claim where "[a]lthough he does not specifically request release, the finding of such declaratory relief in his favor would show that release was required"); *Clutchette v. Procunier*, 497 F.2d 809, 812-14 (9th Cir. 1974) (prisoner may bring section 1983 action to challenge disciplinary procedures having only "speculative and incidental effect" on length of sentence without first exhausting state remedies), *modified*, 510 F.2d 613 (9th Cir. 1975), *rev'd on different grounds sub nom. Baxter v. Palmigiano*, 425 U.S. 308 (1976). See also *Bergen v. Spaulding*, No. 87-4133, slip op. 8709, 8716 (9th Cir. Aug. 3, 1989) (permitting section 1983 suit for deprivation of good-time credits to proceed where plaintiff no longer serving prison sentence). We become the tenth circuit court to adopt it.

2. Although we join our sister circuits, we share a concern expressed by many of them. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court observed:

The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But

the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser* . . .

Id. at 554-55 (citation and footnote omitted). We are acutely aware that this language appears to conflict with the rule we have just adopted; this passage from *Wolff* may suggest that the exclusivity of habeas turns on the type of relief requested by the plaintiff. We are not the first court to worry about this problem: Many of the decisions cited above discuss *Wolff* at length and attempt to distinguish it, none very persuasively. See, e.g., *Offet*, 823 F.2d at 1259-61; *Todd*, 712 F.2d at 72-73; *Hanson*, 791 F.2d at 95-96. While we, too, are unable to come up with a principled way of distinguishing *Wolff*, we agree with Judge Bowman, writing for the Eighth Circuit, that "to read *Wolff* as allowing a state prisoner to avoid the exhaustion requirement by artful pleading is to set *Wolff* at odds with the rationale of *Preiser*, and we do not believe that the Court intended such a result." *Offet*, 823 F.2d at 1260.

We would nevertheless feel bound to follow *Wolff*, and thereby create a conflict with nine of our sister circuits, were it not for a brief excursion made by the Supreme Court at the end of its opinion in *Tower v. Glover*, 467 U.S. 914 (1984). Even though the issue we consider today was not presented in *Tower*, the Court went out of its way to note: "We . . . have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Id.* at 923.

Although this statement is dictum,² we take it seriously: Because the statement would make no sense if *Wolff* had resolved the question we face today, we presume that the *Tower* majority deliberately included it in its opinion to signal that the Court deems itself not to have ruled on our issue. Thus, while *Wolff* on its face appears to foreclose the decision we reach, the Court evidently does not view it that way. This is fortunate, as it spares us the necessity of creating an inter-circuit conflict on a fundamental and recurring issue.

[5] 3. Because Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld would undermine the exhaustion requirement in federal habeas actions and frustrate important values of federal-state comity.³ The

²Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, complained about this:

Although the issue was never raised by the parties, and although, as the Court properly concedes, the issue has absolutely no bearing on the disposition of this case, the Court nevertheless has seen fit to observe that it "ha[s] no occasion to decide" whether federal courts should "abstain" from deciding a state prisoner's § 1983 suit for damages stemming from an unlawful conviction pending that prisoner's exhaustion of collateral state-court challenges to his conviction. The reasons why the Court has no "occasion" to decide this question are clear enough: The question was never pressed or passed upon below, never briefed or argued in this Court, and, because respondent Glover has already exhausted all state-court remedies, the issue has no bearing whatsoever on the proper resolution of the controversy we have been called upon to decide.

467 U.S. at 924 (Brennan, J., concurring) (citation omitted). The four concurring justices joined all of *Tower* except the paragraph discussing the issue raised in this case.

³The district court did not consider Young's claims that restoration of his jail-time credits will *not* reduce the sentence he is currently serving. On remand, the district court shall determine whether restoration of Young's jail-time credits could result in his speedier release. If not, habeas would no longer be his exclusive federal remedy, see *Preiser*, 411 U.S. at 500, and he could therefore proceed in federal court under section 1983.

district court, following this line of reasoning, dismissed Young's complaint. Dismissal, however, could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement. Exhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim. Accordingly, district courts in some circuits stay, rather than dismiss, section 1983 complaints in this posture. *See, e.g., Mack*, 835 F.2d at 999-1000; *Richardson*, 651 F.2d at 373; *Offet*, 823 F.2d at 1261. This is a wise policy; it would hardly promote the goals of the Civil Rights Act of 1871 to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late.

We therefore vacate the district court's order dismissing Young's complaint. The court shall, instead, stay federal proceedings so that Young may have an opportunity to pursue state remedies. Young may proceed further in the district court only after he has exhausted those remedies or is no longer serving a prison sentence capable of being reduced by the application of jail-time credits.

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 ROBERT H. YOUNG, '

7 Plaintiff,

NO. C87-722T

8 vs.

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

9 PHYLLIS KENNY, et al.,

10 Defendant.
11

12 This matter has been referred to United States
13 Magistrate Franklin D. Burgess pursuant to 28 U.S.C. §636(b)(1)(B)
14 and local Magistrates Rule MR4. This matter comes before the
15 court upon the defendants' Motion to Dismiss for Failure to State
16 a Claim, and pursuant to an Order issued February 23, 1988,
17 commanding that the issue of exhaustion of state remedies be
18 briefed.

19 The plaintiff is a state prisoner who seeks damages and
20 prospective injunctive relief (under the Civil Rights Act, 42
21 U.S.C. § 1983) for the defendants' alleged improper calculation of
22 his jail time credits. The defendants moved for dismissal
23 contending that the plaintiff has failed to present a wrong of
24 constitutional dimensions (a fundamental prerequisite for a § 1983
25 action). Before reaching the merits of the defendants' arguments,
26

1 however, this Magistrate requested briefing from the parties
2 regarding whether this court should exercise jurisdiction under
3 Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439
4 (1973); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d
5 675 (9th Cir. 1984); and Offet v. Solem, 823 F.2d 1256, 1258 (8th
6 Cir. 1987).

7 The plaintiff's briefing, while remarkably well
8 thought-out and detailed, skirts the primary concern of the
9 exhaustion issue. Without reaching the merits of the action,
10 therefore, this Magistrate recommends that this matter be
11 dismissed for failure to exhaust state remedies.

12 APPLICABILITY OF EXHAUSTION REQUIREMENT

13 A habeas corpus action, one intended to secure federal
14 habeas relief from state incarceration, must be exhausted in the
15 state courts prior to being presented in federal court. 28 U.S.C.
16 § 2254(b); Rose v. Lundy, 455 U.S. 509, 520, 102 S.Ct. 1198, 71
17 L.Ed.2d 379 (1982). This requirement is meant to provide the
18 state's highest court an opportunity to rule definitively on the
19 legal issues raised by a state prisoner, thus serving the policy
20 of comity between state and federal courts. Rose v. Lundy, supra,
21 455 U.S. at 515-20.

22 Ordinarily, an action under 42 U.S.C. § 1983 need not be
23 exhausted. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S.Ct.
24 407, 30 L.Ed.2d 418 (1971). However, a § 1983 action that raises
25 habeas-style claims is not maintainable without a showing of
26 exhaustion. See, for example, Preiser v. Rodriguez, 411 U.S. 475,

93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). The court there held that where state prisoners are seeking the reinstatement of good-time credits that would result in the shortening of their sentences, the action is most properly treated as a petition for habeas corpus. The court, in distinguishing Wilwording, stated that

[i]f a petitioner seeks to attack both the conditions of his confinement and the fact or length of confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies.

Preiser v. Rodriguez, 411 U.S. at 499, n.14.

Even if a prisoner does not seek habeas-style relief (release or a shortening of sentence), exhaustion must be shown as to any claims regarding the legitimacy of continued incarceration. Because of the principle of res judicata, "a federal ruling on the constitutional issue underlying the § 1983 claim effectively would preclude state consideration in a subsequent state proceedings." Offet v. Solem, 823 F.2d 1256, 1258 (8th Cir. 1987). Herein lies the core of the problem facing the court, and the flaw in the plaintiff's briefing. The plaintiff's § 1983 action must be founded upon a violation of a constitutional right. The court could therefore grant no relief without in fact holding that the plaintiff's constitutional rights had been violated. Once obtaining such a judgment (finding a constitutional violation), the state courts would be bound thereby in any future state proceedings initiated by the plaintiff. The plaintiff would thus be able to evade the requirement of exhaustion.

1 In Offet, a prisoner sought damages and declaratory
2 relief under 42 U.S.C. § 1983 from prison officials, arguing that
3 they had unconstitutionally deprived him of good-time credits on
4 his sentence. The Eighth Circuit held that the prisoner was
5 required to exhaust his claims:

6 Although Offet ostensibly challenges the
7 system by which his good time credits were
8 deprived, a finding in his favor on the
9 underlying constitutional issue inevitably
10 would lead to the restoration of those credits
11 in a subsequent habeas proceeding against the
12 state. The indirect effect of a successful §
13 1983 action by Offet thus would be to shorten
14 the length of his sentence. From the
15 standpoint of federal-state comity, we see no
16 difference between the effect of a federal
17 judgment directing release of a prisoner and
18 one which leaves the state court no choice but
19 to order the same.

20 Offet, 823 F.2d at 1259 (emphasis added).

21 In Ybarra v. Reno Thunderbird Mobile Home Village, 723
22 F.2d 675 (9th Cir. 1984), the Ninth Circuit similarly probed the
23 collateral estoppel effect of § 1983 relief.

24 It is clear the basis of Ybarra's claim is a
25 challenge to the constitutionality of his
26 conviction; in order to prevail on this claim,
he must collaterally void his state court
conviction. [Citation omitted]. Although he
does not specifically request release, the
finding of such declaratory relief in his
favor should show that release was required.

Ybarra, 723 F.2d at 682. Accordingly, an unexhausted § 1983
action challenging the constitutionality of continued confinement
must be deemed an improper circumvention of the writ of habeas
corpus.

1 The plaintiff points to Wolfe v. McDonnell, 418 U.S.
2 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1973), as supporting his
3 argument. Indeed, the plaintiff is correct:

4 The complaint in this case sought restoration
5 of good-time credits, and the Court of Appeals
6 correctly held this relief foreclosed under
7 Preiser. But the complaint also sought
8 damages; and Preiser expressly contemplated
9 that claims properly brought under § 1983
10 could go forward while actual restoration of
11 good-time credits is sought in state
12 proceedings. 411 U.S. at 499 n.14. [Footnote
13 omitted]. Respondent's damages claim was
14 therefore properly before the District Court
15 and required determination of the validity of
16 the procedures employed for imposing
17 sanctions, including loss of good time, for
18 flagrant or serious misconduct. Such a
19 declaratory judgment as a predicate to a
20 damages award would not be barred by Preiser;
21 and because under that case only an injunction
22 restoring good time improperly taken is
23 foreclosed, neither would it preclude a
24 litigant with standing from obtaining by way
25 of ancillary relief an otherwise proper
26 injunction enjoining the prospective
enforcement of invalid prison regulations.

We therefore conclude that it was proper for
the Court of appeals and the District Court to
determine the validity of the procedures for
revoking good-time credits and to fashion
appropriate remedies for any constitutional
violations ascertained, short of ordering the
actual restoration of good time already
cancelled. [Footnote omitted].

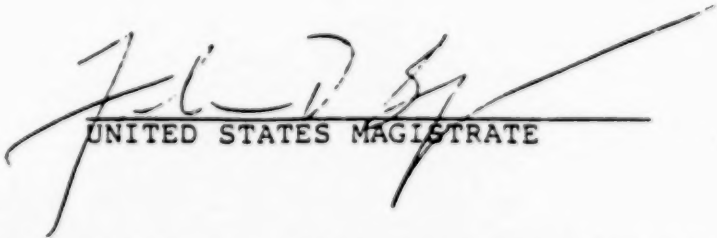
Wolff v. McDonnell, supra, 418 U.S. at 554-5.

However, this Magistrate is inclined to agree with the
Eighth Circuit that "Wolff was not intended to undercut Preiser's
policy requiring exhaustion." Offet, 823 F.2d at 1260. Without
reviewing the Offet analysis at length, this Magistrate would
refer the parties to the discussion at 823 F.2d 1259-60.

1 Furthermore, the Eighth Circuit noted that the Supreme Court
2 itself did not view Wolff as settling this issue. In a later
3 decision, Tower v. Glover, 467 U.S. 914, 922, 104 S.Ct. 2820,
4 2825, 81 L.Ed.2d 758 (1984), the Court wrote that it had "no
5 occasion to decide if a Federal District Court should abstain from
6 deciding a § 1983 suit for damage stemming from an unlawful
7 conviction pending the collateral exhaustion of state court
8 attacks on the convictions itself." This basic issue is thus
9 evidently still open, and this court is bound to follow the Ninth
10 Circuit view as presented in Ybarra.

11 Based on the above, this Magistrate must conclude that
12 the plaintiff is required to exhaust these claims in state court.
13 An issue is not deemed to be exhausted until it has been presented
14 to the State's highest court. Picard v. Connor, 404 U. S. 270,
15 276, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). It appears from the
16 Complaint that the plaintiff has not presented these issues to the
17 State Supreme Court.¹ Accordingly, it is the recommendation of
18 this Magistrate that this action be dismissed.

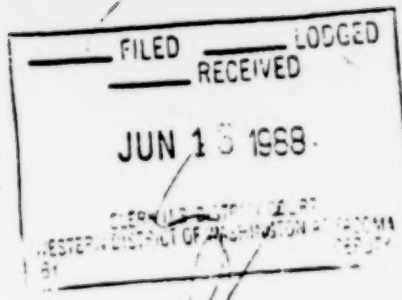
19 DATED this 26 day of May, 1988.

20
21 
22 UNITED STATES MAGISTRATE
23

24 -----
25 ¹The plaintiff contends that there are inadequate remedies at the
26 state court level. He notes that he cannot in a state Personal
Restraint Petition seek the damages sought herein. However, he
does not explain why he is unable to file a state tort action
instead.

1 ENTERED ON
2 JUN 13 1988

3 By Deputy



FILED
MAY 27 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT H. YOUNG,

Plaintiff,

vs.

PHYLLIS KENNY, et al.,

Defendant.

NO. C87-722T

O R D E R

Plaintiff has filed a complaint herein pursuant to 28 U.S.C. § 1983 and the matter has been referred to the United States Magistrate who has made a Report and Recommendation in this matter.

After reviewing the file herein and the Report of the Magistrate, it is hereby

ORDERED:

1. The Report and Recommendation of the Magistrate is hereby approved and adopted by this court.

2. This action is dismissed.

3. The Clerk of the court shall direct copies of this order to counsel for plaintiff (if any, otherwise to plaintiff) and to counsel of record for defendant.

DATED this 13th day of June, 1988.

Jack B. Tanner
UNITED STATES DISTRICT JUDGE

Appendix D

Title 42 U.S.C. §1983

— Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.